JUDGE MARC L. BARRECA
Seattle
Chapter 7
Hearing Date: May 27, 2011
Hearing Time: 9:30 am
Response Date: May 20, 2011

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In re: ADAM R. GROSSMAN, Debtor.	No. 10-19817 REPLY OF TSAI LAW COMPANY, PLLC RE: TRUSTEE'S OBJECTION TO APPLICATION FOR COMPENSATION

COMES NOW the Tsai Law Company, PLLC ("Tsai Law Company", and alternatively, "Emily Tsai"), Court-appointed Special Counsel to the Debtor in this case, by and through its counsel, William F. Malaier, Jr. of Nagler & Malaier, P.S., and submits this Reply to the Chapter 7 Trustee's Objection to Application for Compensation of Tsai Law Group, Special Counsel to the Debtor (hereafter, the "Trustee's Objection"). This Reply is supported by the contemporaneously filed Declaration of Emily Tsai.

I. Summary Introduction

Judge Steiner's November 12, 2010 Order approving Ms. Tsai's employment as Special Counsel to the Debtor was valid as a matter of law because Ms. Tsai did not misrepresent anything to the Court at that time.

The Trustee's Objection amounts to little more than an exercise in the application of guilt by association, attempting at times, *without any evidentiary basis*, to implicate Ms. Tsai in the

NAGLER & MALAIER, P.S.
500 Union Street, Suite 927
Seattle, WA 98101-2332
(206) 224-3460 FAX (206) 224-3463

allegedly unlawful transfer by the Debtor of over $700,000.00 out of the bankruptcy estate. The Objection attempts to paint Tsai Law Company with the same broad brush of malfeasance that has been applied to the Debtor in this case. Regardless of the Debtor's historical conduct in this bankruptcy proceeding, neither Tsai Law Company nor Emily Tsai have participated in, defended or otherwise furthered the alleged dishonesty that has been attributed to the Debtor by the Chapter 11 Trustee. Rather, Emily Tsai was merely Debtor's divorce lawyer. She previously obtained an Order of this Court (dated November 12, 2010) approving her employment as Special Counsel, *nunc pro tunc*, as well as an Order of this Court entered on the same day (November 12, 2010) denying a motion brought by the Debtor's ex-wife seeking disgorgement of the $7,500.00 payment to Emily Tsai by Peter Hendrickson that has been referenced in the Trustee's Objection. At the time of her appointment, and until we received the Trustee's Objection, Ms. Tsai had no knowledge of the fact that the money she had received from Lyman Opie (and disclosed to the Court at that time) was anything other than an unrestricted gift to be applied to Debtor's legal fees incurred in his divorce proceeding. Thus, as to that payment and as to the issues raised by the Trustee regarding Emily Tsai's appointment as Special Counsel to the Debtor, collateral estoppel precludes further attacks on those issues, as well as subsequent attacks based on the legitimacy of Ms. Tsai's appointment.

Nonetheless, if the funds from Mr. Opie are indeed a loan, and thereby constituted property of the bankruptcy estate, nothing prohibits Ms. Tsai, as approved Special Counsel, to partake of those funds in payment of her administrative claim. It is axiomatic that allowed administrative claims are paid in full, ahead of general unsecured claims, from property of the estate. The Trustee has offered no legal authority for his position that as an administrative claimant, Ms. Tsai should have somehow been barred from being paid by Mr. Opie, *even if Mr. Opie's funds represented property of the bankruptcy estate.*

The remaining bases for the Trustee's Objection are similarly lacking in merit. No allegation has been leveled against Ms. Tsai with regard to the reasonableness of her fees, nor has

NAGLER & MALAIER, P.S.
500 Union Street, Suite 927
Seattle, WA 98101-2332
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the Trustee cited any authority in support of his position that the money currently held in trust by Ms. Tsai, tendered by Dennis Vidach and Susan Meyers under strict contingency that such funds be used to pay Ms. Tsai's fees only, somehow constitute property of the bankruptcy estate and should be forfeited (hereafter, the "Vidach Funds" and the "Meyers Funds", respectively)..

Ms. Tsai is a family lawyer in good standing with the Washington State Bar Association who has attempted at every turn reasonably to comply with Bankruptcy Rule 2016 and 11 U.S.C. § 329. The Trustee's attempts to negatively characterize Ms. Tsai are simply unfair and factually unsupported.

The Chapter 7 Trustee's Objection should be overruled.

II. Argument

A. Ms. Tsai's Statements in Support of Application for Employment as Special Counsel to the Debtor Were, to her Knowledge, True and Correct; as Such, Collateral Estoppel Precludes Subsequent Attacks on the Legitimacy of the November 12, 2010 Order Approving her Appointment.

Collateral estoppel is synonymous with the concept of "issue preclusion", which treats as final those issues which were actually and necessarily decided in a prior suit. *See, for example, Brown v. Felsen*, 442 U.S. 127, 139 n. 10, 99 S.Ct. 2205, 2213 n. 10, 60 L.Ed.2d 767 (1979). In order to prevail on its assertion of collateral estoppel as a defense to litigation, a defendant must establish four criteria:

1) The issue sought to be precluded must be the same as that involved in the prior action;

2) The issue must have been actually litigated;

3) It must have been determined by a valid and final judgment; and

4) The determination must have been essential to the final judgment.

See, In re Berr, 172 B.R. 299 (9th Cir.BAP, 1994), *citing, Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir.1992); *Spilman v. Harley*, 656 F.2d 224, 227–28 (6th Cir.1981); *Matter of Ross*, 602 F.2d 604, 608 (3d Cir.1979).

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In the instant case, the Trustee has based his Objection in part on the legitimacy of this Court's Order approving Ms. Tsai's employment as Special Counsel to the Debtor, contending that Ms. Tsai misrepresented the nature of Lyman Opie's payment to her of $20,000.00 on behalf of the Debtor. The Trustee also makes reference to a similar payment in the amount of $7,500.00 from Peter Hendrickson, received nearly a month prior to the payment from Mr. Opie.

Based on a letter to Ms. Moewes from Lyman Opie's attorney, dated February 7, 2011, in which Mr. Opie's counsel asserts that the $20,000.00 payment to Ms. Tsai was merely one of four loans from Mr. Opie to the Debtor, the Trustee contends that Ms. Tsai misrepresented the nature the payment on her Application for Employment. In fact, Ms. Tsai had no knowledge whatsoever that the $20,000.00 payment from Mr. Opie was a loan to the Debtor, nor is there any evidence before this Court that she knew. Appended to Ms. Tsai's declaration in support of this Reply is an email to her from Mr. Opie at the time the payment was made. No reference to a loan of any kind is made in that email.

Furthermore, contrary to the Trustee's assertion in his Objection, Ms. Tsai never represented to the Court that the funds from Mr. Opie and Mr. Hendrickson were made "with no strings attached". That statement does not appear in Ms. Tsai's November 4, 2010 declaration in support of her Application for Employment (Docket # 43); and while it does appear in the Debtor's Application to hire Ms. Tsai, it has no bearing whatsoever on the veracity of Ms. Tsai's own declaration. The simple fact of the matter is that Ms. Tsai filed a sworn declaration that was to her knowledge, true and accurate, based in part on the email to her from Mr. Opie himself. For the Trustee to come forward at this late date and imply that Ms. Tsai intentionally misled this Court borders on the defamatory.

The issues raised by the Trustee's Objection with regard to Ms. Tsai's statements in support of the Debtor's Application to employ her as Special Counsel were dealt with by Judge Steiner in November, 2010. As this Court is aware, Judge Steiner approved Ms. Tsai's appointement as Special Counsel and simultaneously denied a motion for disgorgement of the

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500 Union Street, Suite 927
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Hendrickson monies brought by Debtor's ex-wife. Per the criteria set forth in the *Berr* case, *supra.*, the issue before this Court now was indeed 1) the same issue before Judge Steiner in November, 2010; 2) it was litigated to and through hearing; 3) a final ruling was entered; and 4) the determination was essential to precise issue before the Court at that time, namely, Ms. Tsai's appointment as Special Counsel to the Debtor. Thus, further attacks by the Trustee on the legitimacy of the Order approving Ms. Tsai's employment are barred by collateral estoppel.

B. The Vidach Funds and the Meyer Funds are Not Property of the Estate, and are Not Subject to Turnover

As the Court is aware from Declaration of Emily Tsai in Support of her Fee Application, Ms. Tsai is currently holding in trust, pending further Order of this Court, the sum of $9,500.00 paid to her on January 28, 2011 by Dennis Vidach, and the sum of $20,000.00 paid to her on February 2, 2011 by Susan Meyers. Both Mr. Vidach and Ms. Meyers have filed sworn declarations with this Court stating that the funds were given "for the sole purpose of paying [Debtor's] attorney in his family law action", and that "if the money is not to be used for this purpose, it must be returned [to Mr. Vidach and Ms. Meyers]". *See*, Declarations of Dennis Vidach and Susan Meyers filed contemporaneously with Ms. Tsai's Application for Compensation.

With few exceptions, the Bankruptcy Code defines property of the estate as "all legal and equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). In cases under Chapter 11 in which the debtor is an individual, this definition is expanded to include all property defined under 11 U.S.C. § 541 that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted..." 11 U.S.C. § 1115(a)(1).

Regarding the validity of a gift of personal property, Washington law requires that certain essential elements must be satisfied. Specifically, there must be 1) clear donative intent by the gift-giver; 2) subject matter capable of passing by delivery; and 3) an actual delivery at the time

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(206) 224-3460 FAX (206) 224-3463

of the gift. *See, for example, Henderson v. Tagg*, 412 P.2d 112, 68 Wash.2d 188 (1966). Washington law further requires that "delivery must be such as will divest the donor of the present control and dominion over the property absolutely and irrevocably, and confer upon the donee the dominion and control." *In re Slocum's Estate*, 83 Wash. 158, 145 P.204 (1915).

In the present case, the Vidach Funds and the Meyers Funds were deposited in Ms. Tsai's IOLTA account on the clear contingency that they be used for his legal fees incurred in the family law proceeding. As such, because they were not delivered with an "absolute and irrevocable" grant of "dominion and control" to the Debtor, they were not outright gifts as defined under Washington law. Rather, those funds were plainly transferred to Ms. Tsai as a conditional gift to the Debtor, vesting only for the purpose of payment for the Ms. Tsai's work in the divorce case. Absent approval of such payment, the funds were expressly required to be returned to Mr. Vidach and Ms. Meyers.

The Trustee fails to assert any argument, let alone legal authority, for his proposition that the Vidach Funds and the Meyers Funds constitute property of the bankruptcy estate. Moreover, the Trustee fails to set forth any argument as to why those funds should not revert back to Mr. Vidach and Ms. Meyers as a matter of law, if they are not to be used to pay Ms. Tsai's fees. Accordingly, those funds should either be paid to Ms. Tsai upon approval of her Application for Compensation, or the Court should authorize Ms. Tsai to return the funds to Mr. Vidach and Ms. Meyers immediately upon entry of an Order to that effect. Under no scenario should those funds be paid into the bankruptcy estate.

C. The Trustee's Remaining Factual Allegations Fail to Provide a Meaningful Basis for Denial of Ms. Tsai's Application for Compensation

In addition to the Trustee's arguments regarding the validity of the Order approving Ms. Tsai's employment, his Objection sets forth a scattershot collection of factual allegations that have no legal bearing on the precise issue before this Court. Instead, these allegations appear to be a baseless attempt to visit the alleged sins of the Debtor upon his family lawyer.

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The Trustee goes to great length describing the conduct of the Debtor, going so far at one instance to imply that Ms. Tsai was involved in a transfer out of the bankruptcy estate by the Debtor of $718,186.00. In fact, the Order addressing this particular issue, along with several other documentary production requirements imposed upon the Debtor, was issued by Judge Steiner on November 16, 2010, four days AFTER entry of the Order approving Ms. Tsai's employment and denying the motion to disgorge. For the Trustee to imply that Ms. Tsai was even tangentially involved in the conduct of the Debtor in his bankruptcy proceeding (outside of his divorce proceeding) is unsupported by evidence of any kind and is just plain wrong.

The Trustee also takes issue with allegedly "huge chunks" of time redacted from Ms. Tsai's billing statements appended to her declaration in support of the fee application. In reality, the redactions were quite minor in nature and degree, and were made to protect sensitive information that is subject to the attorney-client privilege. And while the Court can readily access for itself the redacted statements on file to determine if they have been excessively redacted, Ms. Tsai is willing to allow the Court and the Trustee to view the unredacted billing statements *en camera*, should the Court desire to do so.

Finally, the Trustee makes much ado about Ms. Tsai's technical failure to comply with Rule 2016(b) insofar as Ms. Tsai failed to file supplemental statements of monies received within 15 days of receipt. In this case, Ms. Tsai received the Vidach Funds on February 1, 2011 and the Meyers Funds in early to mid-February, 2011 (via 4 separate checks totaling $20,000.00). Even so, Ms. Tsai held those funds in her IOLTA account, and continues to do so. Her receipt of those funds was plainly disclosed in the instant Application before the Court. Moreover, had Ms. Tsai desired to hide those funds from the Court, she simply would not have applied for those fees or made the disclosure in her Application; she did so in an attempt to comply with the law. For the Trustee to argue that Ms. Tsai's technical violation of Rule 2016(b) should result in disgorgement, when in fact the Trustee would not have even known of the existence of such

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funds had not Ms. Tsai disclosed their existence in her Application before the Court, is disingenuous at best.

III. Conclusion

The Trustee's Objection is largely premised on a faulty assertion; namely, that Ms. Tsai misled the Court back in November, 2010 when her employment as Special Counsel to the Debtor was approved by Judge Steiner, and that as a result, such Order was void. In fact, Ms. Tsai disclosed the transfer from Lyman Opie when her Application for employment was initially filed with Court, and the correspondence accompanying the payment from Mr. Opie to Ms. Tsai made no indication that the funds were a loan to Debtor. Ms. Tsai had no knowledge of the alleged loan, and made no representations to the Court beyond the fact that she had received the funds.

The Trustee makes much of the fact that the funds paid to Ms. Tsai from Opie Lyman were an unauthorized loan to the Debtor. Ms. Tsai had no knowledge of that alleged fact. Even so, had the Lyman funds constituted property of the bankruptcy estate, Ms. Tsai, as Court-approved Special Counsel to the Debtor, would have been entitled to payment from those funds. Ms. Tsai's claims are administrative in nature, and are thus entitled to payment from property of the estate, ahead of general unsecured creditors. The Trustee has not asserted any authority to the contrary.

The Trustee's other bases for opposing Ms. Tsai's Application for Compensation are factual in nature and immaterial to the legal question before the Court. The Trustee has made every effort to convince the Court that Ms. Tsai should be punished for the alleged wrongs of her divorce client, and those allegations are not simply unfounded.

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500 Union Street, Suite 927
Seattle, WA 98101-2332
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WHEREFORE, Ms. Tsai and Tsai Law Company respectfully request that the Court overrule the Trustee's Objection, and in so doing, grant the Application for Compensation presently before the Court.

DATED this 24rd day of May, 2011.

NAGLER & MALAIER, P.S.

/s/William F. Malaier, Jr.
WILLIAM F. MALAIER, JR.
WSBA# 34152
Of Attorneys for Tsai Law Company, PLLC

NAGLER & MALAIER, P.S.
500 Union Street, Suite 927
Seattle, WA 98101-2332
(206) 224-3460 FAX (206) 224-3463